



March 31, 2000

Secretary, Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Comments of the National Multi Housing Council on the Gramm-Leach-Bliley Act Privacy Rule, 16 C.F.R. Part 313, 65 Fed. Reg. 11174 (March 1, 2000)

Dear Sir or Madame:

The National Multi Housing Council and the National Apartment Association (hereinafter "NMHC/NAA") hereby submit the following comments to the Federal Trade Commission's ("the Commission's") proposed regulation on the privacy of consumer financial information, 65 Fed. Reg. 11174 (March 1, 2000), the "Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313" (the "Proposed Rule").

By way of background, NMHC represents the nation's leading firms participating in the multifamily rental housing industry, providing leadership for the apartment industry on legislative and regulatory matters with the NAA, and promoting the exchange of information to enhance quality, affordable apartment living. They are making this submission in response to the request by the Commission in the Proposed Rule for comments on the appropriate scope of the Rule's application relative to financial activities that may involve, *inter alia*, the leasing of real property. See 65 Fed. Reg. at 11175.

As reflected in the preamble to the Proposed Rule, and consistent with the purpose of the Gramm-Leach-Bliley Act ("the GLB Act"), the principal type of entity subject to its requirements is a "financial institution." 65 Fed.Reg. at 11174. As the Commission also notes, Section 509(3) of the GLB Act looks to existing banking law to define the term "financial institution." More specifically, the GLB Act defines a "financial institution" for its purposes to be "any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(k)."

A plain reading of the language of the GLB Act thus leads to the conclusion that the scope of covered "financial activities" under the Act is governed by, and should be applied consistent with, existing law as reflected in the relevant provisions of the Bank Holding Company Act. This would include not only traditional financial activities specified in Section 4(k)(4)(A - E) of the Bank Holding Company Act, but also those activities "closely related to banking," or usual in connection with the transaction of banking as provided in section 4(k)(4)(F). 12 U.S.C. § 1843(k)(4)(F).

In this regard, section 4(k)(4)(F) of the Bank Holding Company Act expressly provides that the definition and scope of those activities deemed to be "closely related to banking" is to be determined by the Federal Reserve Board ("the Board") through regulation. As the Proposed Rule also notes, the Board has, in fact, addressed the scope of such activities by formal rulemaking as set forth in the banking regulations at 12 C.F.R. § 225.28.

As a matter of statutory construction and common sense, it follows that, in enacting the GLB Act, Congress not only adopted the definition of financial activities "closely related to banking" set forth in section 4(k)(4)(F) of the Bank Holding Company Act, but also endorsed the existing regulations promulgated by the Board pursuant to that statutory provision. Similarly, Congress must be presumed to have been aware of the history of that regulation, including the amendments that were made to it in 1997, and the regulatory interpretation offered by the Board in adopting those amendments consistent with section 4(k)(4)(F). 62 Fed. Reg. 9290 (February 28, 1997).

Among other things, the 1997 rulemaking by the Board included specific changes to regulatory definitions of activities closely related to banking. As the Board explained, certain of those changes were made to clarify and carefully circumscribe the limited circumstances under which the leasing of real property would fall within the ambit of financial activities closely related to banking within the meaning of the Bank Holding Company Act of 1956. 62 Fed. Reg. at 9305. As the Board further explained, these modified requirements were developed in the course of litigation prior to 1997 regarding the leasing activities of national banks, and were relied on by the courts to distinguish bank leasing activities from the activities of general property rental businesses. 62 Fed. Reg. at 9306.

Consistent with this, 12 C.F.R. § 225.28(b)(3) now requires that in order for a lease of real property to constitute a financial activity closely related to banking, three requirements must be satisfied: (1) the lease be non-operating, (2) the initial lease term must be at least 90 days, *and* (3) at the inception of the initial lease, the effect of the leasing transaction must be intended to yield a return that will compensate the lessor for its full investment in the property from rental

payments, with the further condition that any estimated residual value of property shall not exceed 25 percent of the acquisition cost.

Read together, these requirements reflect the intent of the Board to carefully limit the scope of nonbanking real estate financial activities that will be considered closely related to banking for regulatory purposes to a narrow set of circumstances involving full payout leases, which the Board views as the functional equivalent of an extension of credit. See 62 Fed. Reg. at 9305. At the same time, the regulations reflect the Board's affirmative intent to exclude general property rental activities (including related services such as rental brokerage services*) from the scope of covered financial activities, consistent with case authority that has developed in the courts.

In this regard, both the explanatory preamble and the text of 12 C.F.R. § 225.28 clarify that the requirement that a lease be "non-operating" means that the bank holding company may not itself (or through a subsidiary) repair, operate, maintain or service the equipment or property being leased during the lease term. As the Board explained, this interpretation had been applied since 1974 "in order to help distinguish bank holding company leasing activities from general commercial [leasing] activities." 62 Fed. Reg. at 9306. In this regard, NMHC/NAA note that most rental housing providers issue leases on an operating basis and are involved in the maintenance of the leased real property and therefore should fall outside the definition of "financial institution" for purposes of the GLB Act.

Similarly, the regulation's exclusion of leasing activities which do not recover the full investment of the lessor in the property during the lease term or result in a greater than 25 percent residual value of the property at the culmination of the lease was obviously included in order to distinguish real property leasing from real estate investment activities. 62 Fed. Reg. at 9306. General real property leasing arrangements do not, as a matter of course, involve either of these objectives.

Additionally, it should be noted that 12 C.F.R. § 225.28(b)(2)(vi) provides that third party asset management, brokerage and servicing activities related to real property are not activities considered to involve the "extension of credit" and therefore are also not "closely

* The language of 12 C.F.R. § 225.28 on its face indicates that the activities of real estate brokers, agents and advisors should be approached consistent with the general scope of real property leasing activities. The potential applicability of the Proposed Rule to brokers and agents should thus be viewed from a regulatory perspective as derivative of the type of property they are servicing.

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related non-banking activities” that would fall within the scope of the Commission’s Proposed Rule. This interpretation is also supported by the Board’s explanatory preamble to 12 C.F.R. § 228(b)(2). See 62 Fed. Reg. at 9305.

In sum, in view of the above, it appears that the Federal Reserve Board, through its regulations, has carefully considered the scope of real estate leasing activities that should be considered nonbanking financial activities closely related to banking and determined that general real property rentals fall outside the narrow ambit of such financial activities. Moreover, Congress expressly looked to this regulatory interpretation to define those financial activities which would render an entity a “financial institution” subject to the requirements of the GLB Act and, in so doing, effectively excluded real property rentals other than full payout non-operating leases from the requirements of the Act. Accordingly, the Commission’s final rule should honor this intent and clarify the limited application of the rule to real estate rental activities and associated services.

Sincerely,

A handwritten signature in black ink, appearing to read 'Clarine Nardi Riddle', with a stylized, cursive script.

Clarine Nardi Riddle
Senior Vice President for Government Affairs of
NMHC/NAA
NMHC General Counsel